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# THE LIMITS OF THE INTERSTATE COMMERCE POWER: HOW TO DECIDE THE CLOSE CASES

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## INTRODUCTION

The exceptional importance of the congressional power to regulate interstate commerce<sup>1</sup> is widely acknowledged.<sup>2</sup> The Commerce Clause authorizes, or is claimed to authorize, a remarkable range, in particular, of criminal prosecutions. One court of appeals case<sup>3</sup> listed an actual or purported Commerce Clause basis for federal criminal statutes focusing on, respectively, animal terrorism,<sup>4</sup> avoiding payment of child support,<sup>5</sup> avoiding prosecution,<sup>6</sup> transportation of strikebreakers,<sup>7</sup> murder for hire,<sup>8</sup>

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1. U.S. CONST. art. I, § 8, cl. 3.

2. See, e.g., EDWARD SAMUEL CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* 67 (14th ed. 1978) (“The Commerce Clause comprises . . . the direct source of the most important peacetime powers of the National Government . . .”); STEVEN D. SMITH, *THE CONSTITUTION AND THE PRIDE OF REASON* 51, 59 (1998); ADRIAN VERMEULE, *LAW’S ABNEGATION: FROM LAW’S EMPIRE TO THE ADMINISTRATIVE STATE* 38, 41 (2016); Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 *NOTRE DAME L. REV.* 167, 167 (2014) (“[T]he Commerce Clause . . . in its New Deal incarnation expanded the powers of the federal government far beyond any level that it had previously held.”); Calvin H. Johnson, *The Dubious Enumerated Power Doctrine*, 22 *CONST. COMMENT.* 25, 30 (2005) (“In the last seventy years, an explosive expansion of the power to regulate commerce . . . has found a wide range of appropriately national activities to be legitimate.”); John Paul Stevens, *Should We Have a New Constitutional Convention?*, *N.Y. REV.* (Oct. 11, 2012), <https://www.nybooks.com/articles/2012/10/11/should-we-have-new-constitutional-convention> [<https://perma.cc/Y56K-FZ87>] (referring to “[t]he central importance of the Commerce Clause”). The scope of the congressional interstate commerce clause regulatory power is elaborately explored in GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 196–254 (8th ed. 2018).

3. *United States v. Ballinger*, 395 F.3d 1218, 1229 (11th Cir. 2005) (en banc).

4. See *id.* (referring to 18 U.S.C. § 43).

5. See *id.* (referring to 18 U.S.C. § 228).

6. See *id.* (referring to 18 U.S.C. § 1073).

7. See *id.* (referring to 18 U.S.C. § 1958).

8. See *id.* (referring to 18 U.S.C. § 2101).

causing a riot,<sup>9</sup> participating in a riot,<sup>10</sup> robbery involving controlled substances,<sup>11</sup> domestic violence,<sup>12</sup> stalking,<sup>13</sup> violating a domestic protective order,<sup>14</sup> and providing minors for sex.<sup>15</sup>

To this listing we might add sex offender registration and notification requirements,<sup>16</sup> biological weapons in the context of terrorism,<sup>17</sup> chemical weapons prohibition,<sup>18</sup> church arson prevention,<sup>19</sup> access to health clinic entrances,<sup>20</sup> hate crimes prevention,<sup>21</sup> a broad federal arson statute,<sup>22</sup> a felon's possession of a firearm,<sup>23</sup> brandishing of a firearm during a violent crime,<sup>24</sup> Hobbs Acts robberies,<sup>25</sup> violent crimes in aid of a racketeering enterprise,<sup>26</sup> and particular crimes associated with child pornography.<sup>27</sup>

9. *See id.* (referring to 18 U.S.C. § 2101).

10. *See id.* (referring to 18 U.S.C. § 2102).

11. *See id.* (referring to 18 U.S.C. § 2118).

12. *See id.* (referring to 18 U.S.C. § 2261).

13. *See id.* (referring to 18 U.S.C. § 2261A).

14. *See id.* (referring to 18 U.S.C. § 2262).

15. *See id.* (referring to 18 U.S.C. § 2423).

16. 18 U.S.C. §§ 113, 2250, *as discussed in* *United States v. Ambert*, 561 F.3d 1202, 1209–10 (11th Cir. 2009); *United States v. Howell*, 552 F.3d 709, 711 (8th Cir. 2009).

17. 18 U.S.C. § 178(2), *as discussed in* *United States v. Le*, 902 F.3d 104, 109–11 (2d Cir. 2018).

18. 18 U.S.C. § 229(a)(1), *as discussed in* *Bond v. United States*, 572 U.S. 844, 844 (2014) (reversing the criminal conviction).

19. 18 U.S.C. § 247, *as discussed in* *United States v. Ballinger*, 395 F.3d 1218, 1221 (11th Cir. 2005) (en banc); *United States v. Corum*, 362 F.3d 489, 492 (8th Cir. 2004); *United States v. Roof*, 225 F. Supp. 3d 438, 452 (D.S.C. 2016).

20. 18 U.S.C. § 248(a)(2), *as discussed in* *Zhang Jinrong v. Chinese Anti-Cult World Alliance*, 314 F. Supp. 3d 420, 423 (E.D.N.Y. 2018).

21. 18 U.S.C. § 249 (a)(2), *as discussed in* *United States v. Hill*, 927 F.3d 188, 193 (4th Cir. 2019); *United States v. Beckham*, No. 3:18-cr-00075-1 2019 U.S. Dist. LEXIS 111582, at \*1 (M.D. Tenn. July 3, 2019); *United States v. Mason*, 993 F. Supp. 2d 1308, 1316 (D. Or. 2014); *United States v. Jenkins*, 909 F. Supp. 2d 763, 763 (E.D. Ky. 2012); *United States v. Mullet*, 868 F. Supp. 2d 618, 620 (N.D. Ohio 2012) (recognizing that scissors and hair clippers used in an assault had moved in interstate commerce; and that the postal system and motor vehicles were also used in connection with the assault in question).

22. 18 U.S.C. § 844(i), *as discussed in* *United States v. Mahon*, 804 F.3d 946, 949 (9th Cir. 2015); *United States v. Laon*, 352 F.3d 286, 288 (6th Cir. 2003); *United States v. Lamont*, 330 F.3d 1249, 1250 (9th Cir. 2003); *United States v. Rayborn*, 312 F.3d 229, 231 (6th Cir. 2002); *United States v. Rea*, 300 F.3d 952, 959 (8th Cir. 2002); *United States v. Odom*, 252 F.3d 1289, 1293 (11th Cir. 2001); *United States v. Grassie*, 237 F.3d 1199, 1207 (10th Cir. 2001); *United States v. Dascenzo*, 152 F.3d 1330, 1301 (11th Cir. 1998).

23. 18 U.S.C. § 922(g)(i), *as discussed in* *United States v. Jordan*, 635 F.3d 1181, 1189 (11th Cir. 2011); *United States v. Urbano*, 563 F.3d 1150, 1153 (10th Cir. 2009).

24. 18 U.S.C. §§ 924 (c)(1)(A), 924(c)(1)(C), *as discussed in* *United States v. Gillespie*, 452 F.3d 1183, 1185 (10th Cir. 2006).

25. 18 U.S.C. § 1951, *as discussed in* *United States v. Lynch*, 437 F.3d 902, 909 (9th Cir. 2006).

26. 18 U.S.C. § 1959(b)(2), *as discussed in* *United States v. Aquart*, 912 F.3d 1, 17–18 (2d Cir. 2018); *United States v. Ulmana*, 750 F.3d 330, 336–37 (4th Cir. 2014); *United States v. Mejia*, 545 F.3d 179, 203 (2d Cir. 2008).

27. 18 U.S.C. § 2251(a), *as discussed in* *United States v. Humphrey*, 845 F.3d 1320, 1321 (10th

For our purposes, the problem is whether a given federal statute, either on its face, or as applied under the circumstances of a particular case, can somehow be sufficiently linked to the legitimate scope of the underlying congressional power to regulate interstate commerce. We are thus concerned with the scope and limits of the interstate commerce power. And our focus is in particular on the many close, difficult, or controversial such cases.

Below, this Article introduces the relevant case law<sup>28</sup> by examining the recent case of *United States v. Hill*,<sup>29</sup> a federal Hate Crimes Prevention Act prosecution of a battery committed on a gay fellow-employee at an Amazon Fulfillment Center.<sup>30</sup> There follows a brief tour of the most crucially relevant Supreme Court Commerce Clause jurisprudence, with an emphasis on current doctrine.<sup>31</sup>

In light of these materials, this Article then highlights a number of largely unsolvable problems in trying to delimit the scope of the Commerce Clause power. There is, merely to begin, the problem of the vagueness of legal language in general and of the key terms embodied in the Commerce Clause more specifically.<sup>32</sup> The vagueness problem impairs attempts to clarify the meaning and bounds of the language of the Commerce Clause.<sup>33</sup>

These largely unsolvable problems of vagueness then afflict the courts' attempts to rely on ideas such as a given activity somehow sufficiently "affecting" interstate commerce, or being such as to sufficiently "concern" interstate commerce.<sup>34</sup> Similarly unsatisfactory are the judicial attempts to rely on a distinction between an entity's being sufficiently "active," or actively engaged with respect to interstate commerce, as supposedly distinct from being merely "passive," or insufficiently engaged with interstate commerce. And then perhaps most deeply problematic is the standard judicial reliance on the idea of sometimes "aggregating" small separate effects on interstate commerce into a hypothetical or actual "substantial" collective effect of those activities on interstate commerce.

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Cir. 2017).

28. See *infra* Part I.

29. *United States v. Hill*, 927 F.3d 188 (4th Cir. 2019).

30. See *id.* at 193–94.

31. See *infra* Part II. For the Court's ongoing attempts to establish what should count as 'commercial' in the context of commercial speech as distinct from non-commercial speech, see, e.g., *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976); *Cent. Hudson Gas & Elec. Co. v. PSC*, 447 U.S. 557 (1980). A copy of even an intensely political book or newspaper, however, is still commercial in the sense of commonly being an item intentionally moving in interstate commerce.

32. See *infra* Part III.

33. See *infra* Part III.

34. See *infra* Part IV.

Given the insolubility of these problems, the Conclusion below recommends instead drawing the boundary lines in close Commerce Clause cases with a conscious regard for independently recognized fundamental constitutional rights and, especially in these close cases, for the expressive or symbolic value, or the lack thereof, of particular statutes and court judgments.

# I. HATE CRIMES LEGISLATION AND THE SCOPE OF THE INTERSTATE COMMERCE POWER: THE HILL CASE

In the recent case of *United States v. Hill*, the Fourth Circuit Court of Appeals considered the scope of congressional power to punish bias-motivated<sup>35</sup> crimes.<sup>36</sup> In this case, the defendant was charged under the federal Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009.<sup>37</sup> The defendant Hill had “boastfully admitted to physically and violently assaulting a co-worker preparing packages for interstate sale and shipment because of the co-worker’s sexual orientation.”<sup>38</sup>

At the time of the incident, Hill and his victim were engaged in tasks such as moving, binning, packing, loading, and scanning items for shipment from the Amazon Fulfillment Center in Chester, Virginia.<sup>39</sup> From the record, Hill approached the victim “from behind and—without provocation or warning—repeatedly punched him in the face.”<sup>40</sup> The victim was treated at the Amazon in-house medical clinic and at a local hospital for bruising, cuts, and a bloody nose.<sup>41</sup>

The victim did not return to work for the remaining several hours of his

35. Questions of the necessary kind and degree of causal relationship between a bias motive and the harm inflicted have been addressed in various legal contexts, with no single approach to the necessary causation emerging as generally applicable. One court has surveyed interpretations of the phrase “because of,” including as “a motivating factor,” “a substantial reason,” “a significant factor,” and more stringently, “solely because of,” or else a “but-for” cause of the harm. For discussion, see *United States v. Jenkins*, 120 F. Supp. 3d 650, 655 (E.D. Ky. 2013). *Jenkins* itself, a hate crimes case, appears to distinguish between “a” substantial factor and “the” substantial factor, and to require that the prohibited bias be “the factor that motivates the conduct . . .” *Id.* at 658. Of course, an act may have two or more jointly necessary causes, or there may be no single necessary or indispensable cause, as the act could have two or motivating causes, each of which would by itself suffice to cause the act, with no single one of these causes itself being necessary. For background, see generally Tony Honore, *Necessary and Sufficient Conditions in Tort Law*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 363 (David G. Owen ed., 1997).

36. *United States v. Hill*, 927 F.3d 188 (4th Cir. 2019).

37. Pub. L. No. 111-84, §§ 4701–13, 123 Stat. 2190, 2833–44 (2009) (codified at 18 U.S.C. § 249(a)(2) (2018)) [hereinafter Hate Crimes Prevention Act] (rider to Defense Authorization Act).

38. *Hill*, 927 F.3d at 193; see also *id.* at 194.

39. See *id.* at 193.

40. *Id.*

41. See *id.* at 194.

shift.<sup>42</sup> The immediate workplace area was closed for perhaps 30-45 minutes to remove the victim's blood from the floor.<sup>43</sup> As it turned out, the Amazon Center did not miss any relevant deadlines "because other areas of the facility absorbed the work."<sup>44</sup>

Hill was initially charged with the state law offense of misdemeanor assault and battery.<sup>45</sup> The state prosecutor, however, noting the absence of any Virginia hate crimes statutory protection based on sexual orientation,<sup>46</sup> asked that the federal government assume the prosecution of the case.<sup>47</sup> A federal grand jury then indicted Hill under the Hate Crimes Prevention Act.<sup>48</sup> The indictment charged Hill with attacking the defendant "because of"<sup>49</sup> the victim's "actual and perceived sexual orientation."<sup>50</sup>

As to the necessary relation between Hill's act and the interstate commerce power, the indictment charged that Hill "interfered with commercial activity in which [the victim] was engaged at the time of the conduct,"<sup>51</sup> and "otherwise affected interstate and foreign commerce."<sup>52</sup>

The court majority in the *Hill* case addressed both the facial and the as-applied legitimacy of the Hate Crime Prevention statute pursuant to the Commerce Clause.<sup>53</sup> The majority noted the specific attention of Congress to the scope of its Commerce Clause power in constitutionally justifying the Hate Crimes Prevention Act.<sup>54</sup> Congress had distinguished hate crimes from other, non-hate-based violent crimes.<sup>55</sup> Among the findings of Congress was that hate-motivated violent crimes "affect interstate commerce in many ways."<sup>56</sup>

In particular, the congressional findings located an interstate nexus

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42. *See id.*

43. *See id.*

44. *Id.* One might ask, however, whether interstate commerce could be sufficiently affected by an act that stretches Amazon's local distributing capacity thinner by forcing Amazon to call upon other workers, or upon reserve workers, to take on additional tasks, whether at the immediate expense of their other tasks or not.

45. *See id.*

46. *See id.*

47. *See id.*

48. *See id.* (referring to the federal hate crimes statute in *supra* note 37).

49. *See id.* For the lack of consensus on the precise import of "because of" in this and similar contexts, *see supra* note 35.

50. *Id.*

51. *Id.*

52. *Id.*

53. *See id.* at 196.

54. *See id.*

55. *See id.*

56. *Id.* (internal citation omitted).

referring to the impeded and the forced movement across state lines of victimized members of the specified targeted groups;<sup>57</sup> to the prevention of targeted group members from fully participating in the interstate economy;<sup>58</sup> to the crossing of state lines by hate crime perpetrators;<sup>59</sup> to the use by perpetrators of the “channels, facilities, and instrumentalities of interstate commerce;<sup>60</sup> and to violence perpetrated by using objects that have themselves traveled in interstate commerce.<sup>61</sup> Whether any one, or some combination of, these factors, to one extent or another, could suffice to establish a constitutionally satisfactory link between a given hate crime and interstate commerce was left unaddressed by Congress.

What seems clear, however, is that Congress intended to extend the coverage of the Hate Crimes Prevention Act to the full scope of its power to regulate interstate commerce. That is, there was no congressional intent to adopt a restricted scope for the Hate Crime Prevention Act by requiring a stronger connection between the underlying conduct and interstate commerce than would be constitutionally necessary.<sup>62</sup>

The court in *Hill* then concluded that “when Congress may regulate an economic or commercial activity, it also may regulate violent conduct that interfaces with or affects that activity.”<sup>63</sup> Based on this understanding of the law and the facts recited above, the court saw no error in the jury’s finding that Hill’s conduct “interfered with”<sup>64</sup> or “affected”<sup>65</sup> the “preparation of packages for interstate sale and shipment, and therefore ‘affect[ed] commerce over which the United States has jurisdiction.’”<sup>66</sup>

That the Amazon facility’s operations were in some respects unaffected, or only minimally affected, did not dictate a contrary result, as “Congress may regulate interference with commerce, even if the effect of the interference on interstate commerce in an individual case is ‘minimal.’”<sup>67</sup> In as-applied challenges, the courts are to look not to the interstate commerce

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57. *See id.*

58. *See id.*

59. *See id.*

60. *See id.*

61. *See id.*

62. *See id.* For background discussion, *see* *Russell v. United States*, 471 U.S. 858, 860–62 (1985); *Jones v. United States*, 529 U.S. 848, 856–57 (2000) (declining to impute an exceptionally broad intended scope of coverage to Congress in enacting the federal arson statute).

63. *Hill*, 927 F.3d at 201.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 202 (citing *Taylor v. United States*, 136 S. Ct. 2074, 2081 (2016) (Hobbs Act robbery and firearm case)).

significance or insignificance of the particular event in question, but to the impact on interstate commerce of an aggregated class of offending acts, taken together.<sup>68</sup>

Certainly, the hate-motivated battery in *Hill* need not be thought of as, itself, some sort of economic or commercial transaction.<sup>69</sup> Instead, the Hate Crimes Prevention Act's explicit interstate commerce nexus requirements, or its jurisdictional hook, "ensures that the statute regulates only *economic* violent criminal conduct, not . . . *noneconomic* violent criminal conduct."<sup>70</sup> Thus the Hate Crimes Prevention Act, as properly interpreted, requires that the victim have been engaged at the time of the offense in economic or commercial activity.<sup>71</sup> It does not purport to grant a general federal license to prosecute all hate-motivated crimes, however private the circumstances.<sup>72</sup>

The *Hill* case, however, also produced a dissenting opinion on the merits of the Commerce Clause nexus issue.<sup>73</sup> Judge Agee determined, in dissent, that *Hill*'s prosecution fell outside the boundaries of congressional power to legislate crimes pursuant to its interstate commerce regulatory power.<sup>74</sup> Judge Agee found the Hate Crime Prevention Act's explicit jurisdictional provision,<sup>75</sup> or its jurisdictional nexus, to extend the reach of the statute beyond the legitimate scope of the Commerce Clause.<sup>76</sup> Judge Agee determined that the defendant's "bias-motivated punch . . . [was] not an inherently economic activity and therefore not within the scope of Congress' Commerce Clause authority."<sup>77</sup> His crucial focus was thus on the defendant's motive and his conduct, in and of itself. A bias-motivated battery, presumably, might be committed partly from bias, and partly from a desire to prevent the victim from engaging in interstate commerce. In such a case the perpetrator might himself therein be affecting interstate commerce. But not all bias-motivated batteries need have, in themselves, any such relation to interstate commerce.

Judge Agee's underlying concern was with the potential illimitability

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68. *See id.*

69. For the reliance on this distinction, see *United States v. Morrison*, 529 U.S. 598, 617 (2000) (Violence Against Women Act case).

70. *Hill*, 927 F.3d at 204, 205. For discussion of the typical value, but not the invariable decisiveness, of an explicit statutory jurisdictional "hook" or linkage to interstate commerce, see *id.* at 208.

71. *See id.* at 205.

72. *See id.*

73. *See id.* at 210 (Agee, J., dissenting).

74. *See id.* (Agee, J., dissenting).

75. 18 U.S.C. § 249(a)(2)(B)(iv)(I) (2018).

76. *See Hill*, 927 F.3d at 210 (Agee, J., dissenting).

77. *See id.* (Agee, J., dissenting).

of the federal Commerce Clause. In his words:

To allow Congress to exercise its Commerce Clause power over the non-economic offense of a bias-motivated punch would allow Congress to exercise its Commerce Clause power based on such indirect—and often, as here, non-existent—connection to commerce that it converts the Clause into a federal police power.<sup>78</sup>

Judge Agee argued that permitting the Hate Crime Prevention Act's jurisdictional statute to cover the case at bar would encompass any bias-motivated battery "as long as the government can show that the victim [as distinct from the defendant] was 'engaged' in some sort of economic activity."<sup>79</sup> Given what he saw in this case as an "attenuated"<sup>80</sup> linkage between the regulated conduct and interstate commerce,<sup>81</sup> Judge Agee feared for the constitutional distinction "between what is truly national and what is truly local."<sup>82</sup>

Overall, the *Hill* case at least suggests most of the significant issues associated with the limits of the congressional interstate commerce power. The crucial underlying problem, however, is that not all of the issues present in the *Hill* case are consciously and expressly recognized, let alone consciously addressed. This Article takes up the important issues, both recognized and latent, in *Hill* below.<sup>83</sup> Any understanding of these issues, however, depends upon a sense of the relevant Supreme Court case law. Thus, a highly selective, stage-setting presentation of the most crucially relevant Supreme Court jurisprudence follows.

## II. THE SUPREME COURT CASES: SOURCE OF ANSWERS AND OF UNRESOLVED QUESTIONS

However much the Supreme Court may have later vacillated between expansive and narrowing approaches to the scope of the interstate commerce power, the seminal case of *Gibbons v. Ogden*<sup>84</sup> seems to endorse a broad understanding of, respectively, the scope and meaning of "commerce,"<sup>85</sup> the

78. *Id.* at 223 (Agee, J., dissenting).

79. *Id.* (Agee, J., dissenting) (citation omitted).

80. *Id.* at 224 (Agee, J., dissenting).

81. *See id.* (Agee, J., dissenting).

82. *Id.* at 225 (Agee, J., dissenting) (quoting *United States v. Morrison*, 529 U.S. 598, 617–18 (2000)).

83. *See infra* Part III.

84. *Gibbons v. Ogden*, 22 U.S. 1 (1824).

85. *See id.* at 189–90 (defining "commerce" as extending far beyond the actual traffic in or exchange of commodities).



scope and meaning of “interstate” commerce,<sup>86</sup> and the scope and meaning of “regulation” of interstate commerce.<sup>87</sup> The mark left by the *Gibbons* opinion in each of these respects has been, despite changing judicial emphases, indelible.

The *Gibbons* opinion attempted to describe the distinctive nature of the commerce that is, for constitutional purposes, interstate in character. In the words of Chief Justice Marshall, distinctively “interstate” commerce does not encompass the commerce that “is completely internal [to a single state], which is carried on between man and man in a State, or between different parts of the same State . . . .”<sup>88</sup> This language, however, tells us only what interstate commerce is not.

When Chief Justice Marshall expressed the idea of “interstate” more positively, he set a durable precedent by referring to the ideas of commerce extending to, concerning, or, crucially, “affecting,”<sup>89</sup> more than one state.<sup>90</sup> The language of “affecting” more than one state has become an apparently essential element of the Commerce Clause cases. The language of “affecting” interstate commerce in some sufficient fashion, or to some sufficient degree, recurs throughout crucial cases including *Wickard v. Filburn*,<sup>91</sup> *Heart of Atlanta Motel, Inc. v. United States*,<sup>92</sup> *Katzenbach v. McClung*,<sup>93</sup> *United States v. Lopez*,<sup>94</sup> *United States v. Morrison*,<sup>95</sup> *Gonzales v. Raich*,<sup>96</sup> and *National Federation of Independent Business v. Sebelius*.<sup>97</sup>

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86. See *id.* at 193–95.

87. See *id.* at 195–200 (defining “regulation” as extending far beyond prohibition, as distinct from a broader power of imposing any sort of rule regarding the object in question).

88. *Id.* at 194.

89. See *id.* at 194–95 (using the language of “extend to or affect other states;” of “concerns which affect the States generally;” and of “affect other states”).

90. See *id.*

91. See *Wickard v. Filburn*, 317 U.S. 111, 124 (1942) (home consumption of home-produced wheat).

92. See *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 258 (1964) (holding that a racially segregated Georgia hotel sufficiently affected interstate commerce).

93. See *Katzenbach v. McClung*, 379 U.S. 294, 302 (1964) (using “affect other states” language as well as that of “exerts a substantial economic effect on interstate commerce”).

94. See *United States v. Lopez*, 514 U.S. 549, 559 (1995) (discussing gun possession in school zone case and referring to “activities that substantially affect interstate commerce”). For an exceptionally useful and concise overview of the *Lopez* case on what constitutes commerce and interstate commerce, see Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 746–47 (1995).

95. See *United States v. Morrison*, 529 U.S. 598, 612 (2000) (federal Violence Against Women Act case) (discussing the “effects” and the “substantial effects” language in *Lopez*).

96. See *Gonzales v. Raich*, 545 U.S. 1, 19–20 (2005) (discussing the scope of the federal power to regulate local marijuana cultivation and addressing the aggregated effects of local cultivation on interstate drug prices and the overall “substantial effect” on the national market).

97. See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 549 (2012) (plurality opinion)

The Court's continuing reliance on the concept of "affecting," or "concerning," interstate commerce leads, however, into important general and specific<sup>98</sup> problems of vagueness and of policy uncertainty.

The Court's inquiries into the idea of "affecting" interstate commerce become inseparable from questions of adding up, or aggregating, many instances of activities that each, by themselves, have only a trivial effect on interstate commerce. The Court's willingness to aggregate individually minimal effects on interstate commerce is famously developed in *Wickard v. Filburn*.<sup>99</sup>

In *Wickard*, an individual farmer exceeded his allotted wheat production quota, with the excess wheat then being variously used on his own local farm, rather than being sold on the interstate wheat market.<sup>100</sup> The farmer was by himself a price-taker, rather than a price-maker, in the wheat market. But the Court noted the existence of many other farmers similarly situated under the farm price support program in question.<sup>101</sup> Based on the logic of aggregation, the Court declared:

That [Filburn's] own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.<sup>102</sup>

The idea of aggregating a number of individually insignificant cases into a collectively sufficient effect on interstate commerce was then later pursued against individual businesses in the racial discrimination cases,<sup>103</sup> in *Gonzales*,<sup>104</sup> in *Sebelius*,<sup>105</sup> and in the Hobbs Act robbery case of *Taylor v.*

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(discussing the Affordable Care Act individual mandate and referring to aggregation of similar activities that jointly "substantially affect . . . interstate commerce"). The *Sebelius* case also illustrates the frequent attempts by the courts to resolve Commerce Clause power cases through some sort of distinction between a party's "activity" as opposed to that party's "passivity" in the relevant respect. *See id.* at 553–55.

98. The question of how much of an effect on interstate commerce is actually required is notoriously unresolved as among merely potential effects, slight actual or probable effects, and significant or substantial effects, whether actual or likely. *See United States v. Lee*, 834 F.3d 145, 150–51 (2d Cir. 2016).

99. *See Wickard v. Filburn*, 317 U.S. 111, 127–28 (1942).

100. *See id.* at 114–15.

101. *See id.* at 127.

102. *Id.* at 127–29.

103. *See Heart of Atlanta Motel v. United States*, 379 U.S. 241, 258 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 300–01 (1964).

104. *See Gonzales v. Raich*, 545 U.S. 1, 19, 22 (2005).

105. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 549 (2012) (plurality opinion) ("Congress's power . . . is not limited to regulation of an activity that by itself substantially affects interstate commerce, but also extends to activities that do so only when aggregated with similar activities of others.").

*United States*.<sup>106</sup> Unfortunately, the idea of aggregation in the Commerce Clause area is fraught with a number of unaddressed, and certainly unresolved, problems.<sup>107</sup>

The Court has also attempted to draw Commerce Clause boundary lines through recourse to some sort of distinction between “activity,” or initiative-taking by the relevant party, and “passivity,” or something like ordinary behavior apart from any distinctive association with interstate commerce. While this distinction is most familiar from *Sebelius*, which dealt with the Affordable Care Act,<sup>108</sup> the active-passive distinction, or something akin thereto, also occurs elsewhere.<sup>109</sup> This inevitably controversial and contested distinction is also briefly explored below.<sup>110</sup>

Finally, the Court has acknowledged that in many of the most interesting cases, the Commerce Clause power is really not primarily about commerce. The power to regulate interstate commerce is, in such cases, instead seized upon opportunistically by Congress as an expedient means of promoting some element of morality, equality, justice, or personal dignity. Regulating the flow of goods, services, or persons in interstate commerce may be a genuine, but secondary, concern to the legislators in such cases. Among the Supreme Court cases in which the Commerce Clause power was successfully invoked largely to promote morality, equality, justice, or personal dignity are the foreign and interstate lottery ticket suppression case of *Champion v. Ames*,<sup>111</sup> the sex trafficking case of *Caminetti v. United States*,<sup>112</sup> the multiple spouse case of *Cleveland v. United States*,<sup>113</sup> and of course the civil rights cases in the line of *Heart of Atlanta Motel*.<sup>114</sup>

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106. See *Taylor v. United States*, 136 S. Ct. 2074, 2080 (2016) (referring not to any individual criminal activity, but to “Congress’ power to regulate purely local activities that are part of an economic ‘class of activities’ that have a substantial effect on interstate commerce” and to a “‘class of activities’ that in the aggregate substantially affect interstate commerce”).

107. See *infra* Part III.

108. See *Sebelius*, 567 U.S. at 553–55.

109. See, e.g., *Jones v. United States*, 529 U.S. 848, 859 (2000); *Russell v. United States*, 471 U.S. 858, 861 (1985).

110. See *infra* Part III.

111. *Champion v. Ames (The Lottery Case)*, 188 U.S. 321, 327–28 (1903) (discussing the interstate transportation of foreign lottery tickets as, supposedly, “confessedly injurious to the public morals”).

112. *Caminetti v. United States*, 242 U.S. 470, 491 (1917) (referring to “the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses”).

113. *Cleveland v. United States*, 329 U.S. 14, 19 (1946) (holding that the interstate commerce power “may be used to defeat what are deemed to be immoral practices,” despite the resemblance in the actual underlying federal legislative motive to the exercise of state police powers).

114. See, e.g., *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 250, 256–57 (1964) (referring respectively to the “fundamental object” of vindicating “personal dignity,” to “immoral and injurious use” of the channels of interstate commerce; and to “legislating against moral wrongs” as, on a mere rational basis review, clearly permissible aims under the Commerce Clause).

These broad, morality-focused cases may be at some distance from the core Commerce Clause cases, which are more economic-efficiency focused.<sup>115</sup> We explore below, however, the possibility that a moral focus may substantially contribute to our best understanding of how to decide the close Commerce Clause cases more generally.<sup>116</sup> For the present, though, the Supreme Court cases cited above suggest some of the largely insoluble boundary area problems inherent in the Commerce Clause cases. These dimensions include problems of general and specific vagueness and ill-definedness;<sup>117</sup> controversy and contestability in applying the concepts of “affecting” and “concerning;”<sup>118</sup> reliance on the perennially controversial distinction between “active” and merely “passive” connections to interstate commerce;<sup>119</sup> and a number of largely unacknowledged problems associated with the idea of aggregation.<sup>120</sup> These elements of the boundary problems of Commerce Clause jurisprudence are addressed below.

### III. DIAGNOSING THE COMMERCE CLAUSE BOUNDARY AREA PROBLEMS

The underlying dynamic in Commerce Clause controversies often reflects differences as to the relevance and the weight of ideas such as federalism, efficiency, democracy, decentralization, plurality and dispersion of authority, and local experimentalism.<sup>121</sup> These differences, however, have manifested themselves in the Commerce Clause cases in distinctive recurring problems.

First are the problems we may classify under the heading of vagueness. Vagueness, for our purposes, is a matter of some number of borderline,<sup>122</sup> or better, boundary area cases of the proper application of a term.<sup>123</sup> While we

115. This is despite the inevitable broader federalism issues. *See* *Houston, E. & W. Tex. Ry. v. United States*, 234 U.S. 342 (1914) (discussing the permissibility of federal regulation of intrastate rail freight rates where necessary to the proper regulation of interstate rates).

116. *See infra* Part IV.

117. *See infra* notes 122–132 and accompanying text.

118. *See infra* notes 133–145 and accompanying text.

119. *See infra* notes 146–153 and accompanying text.

120. *See infra* notes 154–167 and accompanying text.

121. For background references, see GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 177–81 (8th ed. 2018); *see generally* Guido Calabresi & Eric S. Fish, *Federalism and Moral Disagreement*, 101 *MINN. L. REV.* 1 (2016).

122. *See* Ray Sorenson, *Vagueness*, *STAN. ENCYCLOPEDIA PHIL.* (Apr. 5, 2018), <https://plato.stanford.edu/entries/vagueness> [<https://perma.cc/UMA3-ZMLA>].

123. *See id.* The philosophers’ debate whether any boundary case has a genuinely right classification—for example, either bald, or else not bald—even if that right answer is unknowable to us. For this debate, *see generally* Timothy Williamson, *Précis of Vagueness*, 57 *PHIL. & PHENOMENOLOGICAL RES.* 921 (1997) (referring to TIMOTHY WILLIAMSON, *VAGUENESS* (1994));

might say that in a sense, all ordinary language is vague,<sup>124</sup> vagueness clearly is also a matter of degree.<sup>125</sup> In our context, “commerce” and “interstate commerce” are both relatively vague, but the Constitution plainly aspires to a logic of bivalence,<sup>126</sup> or binary classification. Commerce and non-commerce are thought to jointly exhaust the field. They are not thought to be mere segments on a broad continuous spectrum with numerous degrees.

Judicially attempting to fit relatively vague ideas such as “commerce” or “interstate commerce” into bivalent categories—either within or beyond the authorized constitutional scope—will often seem arbitrary and futile. But as we consider below, it may still be possible to adjudicate close Commerce Clause cases by reference to the presence or absence of any overriding interests<sup>127</sup> or fundamental rights<sup>128</sup> that may be lurking in the case at hand, even if the effect of the decision in that case is largely symbolic or expressive in character.<sup>129</sup>

The courts may attempt to reduce the vagueness of “commerce” and of “interstate commerce” by applying some form of original intent or original meaning theory.<sup>130</sup> And such approaches are sometimes endorsed by Commerce Clause scholars today.<sup>131</sup> But even if we endorse some inevitably

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Timothy Williamson & Peter Simons, *Vagueness and Ignorance*, 66 PROC. ARISTOTELIAN SOC’Y 145 (1992); Timothy Williamson, *Wright on the Epistemic Conception of Vagueness*, 56 ANALYSIS 39 (1996). More broadly, see TIMOTHY A.O. ENDICOTT, *VAGUENESS IN LAW* 57–75 (2000).

124. See Bertrand Russell, *Vagueness*, 1 AUSTRALASIAN J. PSYCH. & PHIL. 84, 84 (1923).

125. See *id.* at 88.

126. For background, see Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CALIF. L. REV. 509, 516 (1994).

127. See generally Delia Graff Fara, *Shifting Sands: An Interest Relative Theory of Vagueness*, 28 PHIL. TOPICS 45 (2000).

128. See Keith C. Culver, *Varieties of Vagueness*, 54 U. TORONTO L.J. 109, 111 (2004). For a sense of Dworkin’s moral right-oriented approach to legal vagueness, see generally Ronald Dworkin, *No Right Answer?*, in *LAW, MORALITY & SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART* 58 (Clarendon Press ed. 1977).

129. For elaboration, see *infra* Part IV.

130. See, e.g., *Gibbons v. Ogden*, 22 U.S. 1 (1824) for the historical intent theory adopted by Chief Justice Marshall throughout the case.

131. See generally Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1 (2010) (discussing the then contemporary meaning of “commerce” as not confined narrowly to economic matters, but as also including social interactions beyond business or trade that pose collective action problems); Randy E. Barnett, *Jack Balkin’s Interaction Theory of “Commerce,”* 2012 ILL. L. REV. 623 (discussing the then contemporary usage of “commerce” as, in practice, not including even economic production, let alone social interaction more broadly); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001) (arguing “commerce” originally meant something akin to the exchange of goods and services); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987); Robert G. Natelson & David Kopel, *Commerce in the Commerce Clause: A Response to Jack Balkin*, 109 MICH. L. REV. FIRST IMPRESSIONS 55, 56 (2010) (discussing the contemporary understandings of “commerce” in both ordinary and legal contexts as encompassing “mercantile trade

controversial specific version of originalism, the remaining indeterminacies and apparently unresolvable disputes must limit our progress in usefully pinning down the vagueness of the terms in question.<sup>132</sup>

Even if we could resolve the vagueness issues associated with “commerce” and “interstate commerce” themselves, we would then have to confront the Court’s familiar jurisprudence of conduct that, in some sufficient way, “affects” or “concerns” interstate commerce.<sup>133</sup> Here, we set aside any issues of vagueness, and focus instead on substantive, policy-based uncertainties as to how to best understand and apply terms such as “affects” or “concerns.”

Whether an activity “affects,” and perhaps “sufficiently affects,” commerce or interstate commerce is not a matter of dictionary entries, but of substantive policy choices. A number of the issues are, by analogy, present as well in the use of “affects,” “concerns,” and similar concepts in the classic work of John Stuart Mill on the boundaries of the legitimate exercise of individual liberty.<sup>134</sup> As it turns out, even the celebrated philosopher John Stuart Mill could not apply the concepts of “affect” or “concern” with any consistency. It would be surprising if a shifting, multi-member body such as the Supreme Court could regularly fare any better.

Thus Mill seeks at points to draw the boundary line for permissible government regulation of a person’s activity at what “concerns” the self, as presumably distinct from activity that concerns others.<sup>135</sup> Perhaps more realistically, Mill sometimes shifts to a focus on activity that “more particularly concerns” others.<sup>136</sup> In a related additional qualification, Mill also sometimes seeks to crucially distinguish between effects of conduct on

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and traditionally associated activities” as the primary meaning). For a reading of a nearly contemporaneous essay by David Hume that offers no unequivocal evidence either way, see generally David Hume, *Of Commerce*, in *SELECTED ESSAYS* 154 (Stephen Copley & Andrew Edgar eds., Oxford Univ. Press 2008).

132. See *supra* note 131. Fittingly, Dr. Samuel Johnson’s *A Dictionary of the English Language*, as of 1755, offers both a relatively broad and a relatively narrow understanding of the meaning of “commerce.” See SAMUEL JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE* 417–18 (1755), available at <https://johnsonsdictionaryonline.com/commerce-noun> [<https://perma.cc/UF9Y-5TPG>]. To the extent that the disputes focus on differences between economic and noneconomic affairs, see David M. Driesen, *The Economic/Noneconomic Activity Distinction Under the Commerce Clause*, 67 CASE W. RES. L. REV. 337, 338 (2016) (“Scholars agree that *Lopez* and *Morrison* offer no guidance about how to apply the economic/noneconomic distinction, leaving lower courts adrift.”).

133. See *supra* notes 89–97 and accompanying text.

134. See generally JOHN STUART MILL, *ON LIBERTY & UTILITARIANISM* (Wordsworth 2016) (1859).

135. See *id.* at 15, 16, 83; see also *id.* at 87 (referring to “self-regarding conduct” and to “purely personal conduct”).

136. *Id.* at 78.

others that are “direct” and effects of conduct on others that are merely “indirect.”<sup>137</sup>

But then, perhaps recognizing the dubiousness of this direct-indirect effect distinction, Mill shifts from a focus on affecting others to a focus more specifically on affecting their interests,<sup>138</sup> or affecting their interests “prejudicially.”<sup>139</sup> Mill also seeks to avoid the direct-indirect effect distinction, as well as the problem of identifying interests, by sometimes drawing the crucial line at conduct that “seriously affects”<sup>140</sup> others. Mill does not, however, consistently draw the crucial line at serious harms, as opposed to harms that may be less serious.<sup>141</sup> In fact, Mill sometimes qualifies his “harm” principle to allow for the regulation of activities that merely pose a “a definite risk of damage” to others.<sup>142</sup> The inescapable bottom line is thus simply one of confusion.

Unavoidably, the Court in the Commerce Clause cases must by analogy either confront each of the problems above that afflict Mill’s parallel discussion, or fail in its responsibilities. As it turns out, the Court often relies, for example, on the plainly doubtful and not obviously significant direct-versus-indirect effect on interstate commerce distinction.<sup>143</sup> And where the Court is concerned about effects on interstate commerce, it has often seemed to require that the effects be somehow “substantial.”<sup>144</sup> But the Court has also then admitted that “our case law has not been clear whether an activity must ‘affect’ or ‘substantially affect’ interstate commerce in order to be within Congress’ power to regulate . . . .”<sup>145</sup>

Overall, the Court has not managed the idea of “affecting” commerce

137. *See id.* at 79, 81, 83.

138. At least without their valid consent. *See id.* at 14, 78, 81, 97.

139. *Id.* at 78, 79, 97. For a classic discussion of the distinction between affecting others and affecting their interests, *see* J.C. Rees, *A Re-Reading of Mill On Liberty*, in *LIMITS OF LIBERTY: STUDIES OF MILL’S ON LIBERTY* 87, 93 (Peter Radcliff ed., 1966).

140. MILL, *supra* note 134, at 84; *see also id.* at 15 (referring to causing “evil” to others).

141. *See id.* at 16 (focusing on “harm” to others).

142. *Id.* at 85, 97. For a sense of the critical accounts of these distinctions and their value, *see* DAVID O. BRINK, *MILL’S PROGRESSIVE PRINCIPLES* 173–90 (2013); JOHN GRAY, *MILL ON LIBERTY: A DEFENCE* 48–57 (2d ed. 1996) (critiquing the approach of Rees, *supra* note 139); DALE E. MILLER, *J.S. MILL* 117–32 (2010); JONATHAN RILEY, *MILL ON LIBERTY* 98–102 (1998); C.L. TEN, *MILL ON LIBERTY* 52–67 (1980); David O. Lyons, *Liberty and Harm to Others*, in *MILL’S ON LIBERTY: CRITICAL ESSAYS* 115 (Gerald Dworkin ed., 1997); Ben Saunders, *Reformulating Mill’s Harm Principle*, 125 *MIND* 1005–06 (2016) (emphasizing consent or the lack of consent, as opposed to harm).

143. *See, e.g., United States v. Lopez*, 514 U.S. 549, 557–58 (1995) (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

144. *See, e.g., United States v. Morrison*, 529 U.S. 598, 609, 612, 615; *Lopez*, 514 U.S. at 558–59 (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

145. *Lopez*, 514 U.S. at 559; *see also United States v. Lee*, 834 F.3d 145, 150–51 (2d Cir. 2016).

or interstate commerce any more consistently than did John Stuart Mill in the context of the limits to liberty. A final possibility, though, often arises in the cases in which a statute invokes the Commerce Clause power, but not to its full extent, leaving some constitutionally regulable activities outside the scope of the statute.<sup>146</sup> In such cases, typically some object must have been “used” in interstate commerce. And this statutory requirement has typically moved the courts to distinguish between the “active” use and the mere “passive” use of the entity in interstate commerce.<sup>147</sup>

The attempts by courts to clarify such cases by means of an active-passive use distinction often fail immediately, based on arbitrary descriptions of the specific case circumstances. Consider, for example, an act of arson that reaches only one small building among a complex of other buildings, where only the latter buildings are thought to be “actively” used in interstate commerce. Perhaps these latter buildings could not possibly have been affected by the fire in question. Will it usually be obvious whether the arsonist’s hostility is directed toward one particular building among related other buildings? Isn’t the arsonist’s real hostility sometimes directed toward the entire building complex, or toward the institution or idea it represents?<sup>148</sup>

Beyond such largely arbitrary line-drawing among the possible targeted properties, these cases typically take an elaborate inventory of the ways an entity might be said to be used in interstate commerce, including sometimes marginal matters such as telephone communications or media use; highway use; various forms of insurance; building leases and their terms; the full range of all the activities on one or more of the properties; property use or mere availability to out-of-state guests; property ownership structure; and even connections to utility services.<sup>149</sup> Some of these considerations are then

146. See, e.g., *supra* note 22; *Jones v. United States*, 529 U.S. 848, 856–57 (2000); *Russell v. United States*, 471 U.S. 858, 860–62 (1985); see also *Bond v. United States*, 572 U.S. 844, 866 (2014) (on the courts’ reluctance to broadly interpret a federal criminal statute to impinge upon matters traditionally allocated to state regulation, given the value of federalism, unless Congress has made a “clear statement” to the contrary).

147. See, e.g., *supra* note 146.

148. Consider the disputes over the proper characterizations of targeted buildings and of organizational relationships. For background, see *United States v. Laton*, 352 F.3d 286, 298–30 (6th Cir. 2003) (citing *United States v. Rayborn*, 312 F.3d 229, 234 (6th Cir. 2002); *United States v. Terry*, 257 F.3d 366, 369–70 (4th Cir. 2001); *United States v. Grassie*, 237 F.3d 1199, 1209 (10th Cir. 2001)); *United States v. Lamont*, 330 F.3d 1249, 1255–57 (9th Cir. 2003); *United States v. Rea*, 300 F.3d 952, 960–61 (8th Cir. 2002); *United States v. Tush*, 151 F. Supp. 2d 1246, 1250–1254 (D. Kan. 2001).

149. See *supra* note 148; see also *United States v. Corum*, 362 F.3d 489, 493 (8th Cir. 2004) (“It is well-established that telephones, even when used intrastate, are instrumentalities of interstate commerce.”). Realistically, the degree of any judicial tendency to stretch the idea of interstate commercial linkage may reflect, in some cases, the sheer gravity of any charged criminal activity.



said to fall within the scope of “active” use of the relevant property in interstate commerce, and others to amount only to “passive,” and thus statutorily insufficient, use.<sup>150</sup>

Unavoidably, characterizing a particular feature of an arson-targeted entity as “active” or as “passive” with respect to its use in interstate commerce will typically be largely arbitrary. So will a determination that some set of such activities adds up to a somehow sufficient connection to interstate commerce. But the real problem is that the active-passive use distinction unavoidably sends us down a deeply controversial path. There is a substantial and unresolved debate among the philosophers on the usefulness of the broader active-passive distinction in various contexts.<sup>151</sup>

Of course, the Court is not bound to recognize a relevant philosophical controversy, as it is similarly not bound in the Commerce Clause cases by the relevant conclusions of the economists. Thus, the Court in *Sebelius* argued that “[t]o an economist, perhaps, there is no difference between activity and inactivity; both have measurable economic effects on commerce. But the distinction . . . would not have been lost on the Framers”<sup>152</sup> The problem in our more general context, though, is that the Framers had no clear intent as to how to draw, in practice, any distinction between actively using versus merely passively using some object or property in interstate commerce. If the courts continue to attempt to rely on this distinction, any private party with any inclination to do so can strategically adjust their behavior in such a way as to either minimally qualify or else not qualify as actively using a property in interstate commerce.<sup>153</sup>

A final, and typically unrecognized, crucial boundary area problem

150. See *supra* notes 147–148.

151. See, e.g., JONATHAN GLOVER, CAUSING DEATH AND SAVING LIVES 95–97 (1990) (discussing different sorts of omissions and passivities); Peter Davson-Galle, *Killing and Relevantly Similar Letting Die*, 15 APPLIED PHIL. 199 (1998); Helga Kuhse, *Critical Notice: Why Killing Is Not Always Worse—And Is Sometimes Better—Than Letting Die*, 7 CAMBRIDGE Q. HEALTHCARE ETHICS 371 (1998); Xiaofei Liu, *A Robust Defense of the Doctrine of Doing and Allowing*, 24 UTILITAS 63 (2012); E.J. Lowe, *Active and Passive Euthanasia: An Objection*, 55 PHIL. 550 (1980); Joseph Raz, *The Active and the Passive*, 71 ARISTOTELIAN SOC’Y SUPPLEMENTARY VOLUME 211 (1997); Fiona Woollard & Frances Howard-Snyder, *Doing vs. Allowing Harm*, STAN. ENCYCLOPEDIA OF PHIL. (Nov. 1, 2016), <https://plato.stanford.edu/entries/doing-allowing> [<https://perma.cc/HKP5-M9ST>]. Very roughly, the more one cares about actual consequences, as distinct from the state of mind of a party, the less value in general will one tend to see in the act versus passivity or omission distinction. Of course, we can also imagine omissions or passivities that are clearly intended to result in great harm.

152. Nat’l Fed’n Indep. Bus. v. Sebelius, 567 U.S. 519, 555 (2012).

153. However rarely any entity might be thus motivated, given the availability of insurance and of state-level arson statutes.

involves the Court's jurisprudence of aggregation, in which small units are added up to create an overall "substantial" effect on interstate commerce.<sup>154</sup> The Commerce Clause aggregation jurisprudence is central not only to *Wickard*,<sup>155</sup> but to *Morrison*,<sup>156</sup> *Raich*,<sup>157</sup> *Taylor*,<sup>158</sup> and thence to the recent hate crime case discussed above, *United States v. Hill*.<sup>159</sup>

To this point, however, the Court has not meaningfully addressed several of the most basic problems attending the aggregation process in the Commerce Clause cases. First, the Court has never determined in a definite way whether the aggregation of intrastate activities can consist partly or even entirely of non-economic or non-commercial activities.<sup>160</sup> Second, the Court has referred merely to a "class" of activities that is to be aggregated for purposes of determining whether a substantial effect on interstate commerce exists.<sup>161</sup> But the Court has not meaningfully addressed how to define or limit even a clearly economic "class" of activities. Classes of relevantly similar activities are not self-identifying. Classes can be defined at various degrees of specificity or generality,<sup>162</sup> by either Congress or by the courts.

As merely one example of this class definition problem, consider the problem of criminal attempts. Can criminal attempts, as well as completed offenses, be somehow aggregated in such a way as to "substantially" affect interstate commerce, on a reasonable congressional judgment?<sup>163</sup> More broadly, can the somehow relevantly similar other class members be merely hypothetical? Or else perhaps likely to exist, over some appropriate period of time? Or perhaps just reasonably possible? And, crucially, how would these numbers of class members change over time if the relevant statute

154. The leading aggregation case is *Wickard v. Filburn*, 317 U.S. 111 (1942). See generally Jim Chen, *Filburn's Legacy*, 52 EMORY L.J. 1719 (2003) (discussing *Filburn* and its legacy).

155. See *Wickard*, 317 U.S. at 127–28.

156. See *United States v. Morrison*, 529 U.S. 598, 613 (2000).

157. See *Gonzales v. Raich*, 545 U.S. 1, 17–22 (2005).

158. See *Taylor v. United States*, 136 S. Ct. 2074, 2080 (2016).

159. See *United States v. Hill*, 927 F.3d 188, 194 (4th Cir. 2019) (noting Hill's battery as not in itself affecting the Amazon Center's ability to meet any of its measured deadlines or quotas).

160. See *Morrison*, 529 U.S. at 613. The degree of deference due from courts to congressional findings, or the effects of the absence of such congressional findings, in the context of aggregation issues also varies noticeably. See *id.* at 614.

161. See, e.g., *Raich*, 545 U.S. at 22; *Taylor*, 136 S. Ct. at 2080; see also *Perez v. United States*, 402 U.S. 146, 154 (1971) ("Where the class . . . is within the reach of the federal power, the courts have no power to 'excise, as trivial, individual instances of that class.'" (quoting *Maryland v. Wirtz*, 392 U.S. 183, 193 (1968))).

162. See John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 174, 179–80 (1998). Of course, the very idea of a "substantial" effect, whether through aggregation or not, partakes of vagueness in unusual measure. See generally R. George Wright, *Substantial Burdens in the Law*, 46 SW. L. REV. 1 (2016) (exploring this vagueness at length).

163. See *Taylor*, 136 S. Ct. at 2081–82 (attempt to rob prosecuted under the Hobbs Act).

either were or were not enforced pursuant to the Commerce Clause?<sup>164</sup> Class membership, however defined, need not be fixed over time and unresponsive to enforcement policies. Any enforcement or lack of enforcement of a statute may create incentives, or disincentives, for persons to join the class in question.

More broadly, the Court's aggregation in arriving at a "substantial" effect on interstate commerce faces what is classically called the Sorites problem.<sup>165</sup> The Sorites problem notices that in many binary classification problems, very small changes in the numbers do not allow us to make any principled change in how we classify the case in question.<sup>166</sup> Thus if a person with, say, 117 hairs is bald, so, we seem bound to say, is someone with 118. The problem is that there is no distinct further incremental point—say, then moving from 118 to 119 hairs—at which the person becomes non-bald. But some persons, inescapably, are not bald. In the Commerce Clause area, too, there will be no principled reason to find that some single additional incident or some additional single actor has somehow transformed a previously insubstantial effect into a substantial effect on interstate commerce. If 117 farmers produce only an insubstantial effect on interstate commerce, so, presumably, would 118. But equally clearly, some number of farmers suffices for a substantial collective effect on interstate commerce.

A related further problem addresses the status of universalizing principles, or more familiarly, the status of "what if everyone did that?" tests for any proposed principles. What if Congress or the courts were to find a substantial effect on interstate commerce based on the outcome if "everyone" somehow similarly situated to the defendant—perhaps everyone in general—acted as the defendant did? This would be done not in order to show that the defendant acted in a morally wrong manner,<sup>167</sup> but for

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164. There were obviously, in 1942, many U.S. wheat farmers. Some percentage of them participated in the relevant price support and quota program. And some unspecified percentage of those farmers may have acted in a way either loosely or else closely similar to Roscoe Filburn in *Filburn*. And every Commerce Clause ruling is of course an incentive to change or maintain one's present conduct.

165. For background, see Dominic Hyde & Diana Raffman, *Sorites Paradox*, STAN. ENCYCLOPEDIA OF PHIL. (Mar. 26, 2018), <https://plato.stanford.edu/entries/sorites-paradox> [<https://perma.cc/YFQ4-DR2G>].

166. See *id.*

167. For universalizability, or a "what if everyone did that?" question, as a possible test for the morality of particular acts, see IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 71 (H.J. Paton trans. 1948) (Harper ed. 1964) (1785); see also BRAD HOOKER, *IDEAL CODE, REAL WORLD* 188–89 (2000) (focusing on the expected value of rules if they were internalized by the "overwhelming majority"); Kent Bach, *When to Ask, "What If Everyone Did That?"*, 37 PHIL. & PHENOMENOLOGICAL RES. 464 (1977); Michael Robbins, *The Fallacy of "What If Everybody Did That?"*, 6 SW. J. PHIL. 89 (1975). For a broader discussion of aggregation problems in general, see IWAO HIROSE, *MORAL AGGREGATION* (2015); LARRY S. TEMKIN, *RETHINKING THE GOOD: MORAL IDEALS AND THE NATURE*

constitutional interpretive and policymaking purposes. Would finding a given actor to violate a federal statute based on the substantial effect on interstate commerce that would result if “everyone” at some point acted similarly be reasonable?

Overall, then, the courts attempting to address the close cases as to the scope and meaning of the federal Commerce Clause power face daunting problems as to vagueness;<sup>168</sup> the debates over “affecting” commerce;<sup>169</sup> active versus passive involvement in interstate commerce;<sup>170</sup> and the proper meaning and limits of aggregating in order to reach a somehow substantial effect on interstate commerce.<sup>171</sup> Jointly, these largely unresolved problems threaten to impeach the claim that any particular resolution of a close Commerce Clause case is more reasonable than deciding the case in some contrary fashion. Below, we briefly suggest a value-sensitive alternative approach to the close Commerce Clause power cases.

#### IV. THE ROLE OF FUNDAMENTAL RIGHTS AND LEGAL SYMBOLISM

Let us think of a “close” Commerce Clause case not so much as one which is merely controversial, or which would divide judges, but as one in which the arguments for opposed judicial outcomes seem to an observer to be largely non-comparable, or else nearly equal in their opposed overall strength, even if the contending sides emphasize different considerations. Given this non-comparability or else very rough equality in the perceived strength of the opposed arguments, it seems likely that in some cases, deciding the case in favor of, or against, the exercise of Commerce Clause authority will not make much overall total value difference.<sup>172</sup> But particularly if the two judicial outcomes stem from very different assumptions, predictions, and values, it is also quite possible that deciding even a close case “wrongly” may be costly.

The problem, as we have seen throughout, is that the Supreme Court’s Commerce Clause jurisprudence generates, and then leaves unresolved and often unrecognized, a number of basic interpretive problems. Until such interpretive problems are somehow resolved, how can courts most

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OF PRACTICAL REASONING 23-161 (2015).

168. *See supra* notes 122–132 and accompanying text.

169. *See supra* notes 133–145 and accompanying text.

170. *See supra* notes 146–153 and accompanying text.

171. *See supra* notes 154–167 and accompanying text.

172. If we cannot readily decide whether to go out for the evening or else to stay home, it may be that taking either option would likely produce roughly equally overall value results.

responsibly address and resolve the close cases?

One useful general strategy would be to consider whether the close Commerce Clause case at issue is one that distinctively evokes what has been called the symbolic<sup>173</sup> or expressive<sup>174</sup> functions of lawmaking and adjudication. In a broad sense, symbolic or expressive law and adjudication recurs throughout the law, including freedom of speech;<sup>175</sup> equal protection and respect;<sup>176</sup> Establishment Clause cases;<sup>177</sup> tax policy;<sup>178</sup> and of course in expressivist theories of criminal punishment.<sup>179</sup>

Symbolism and expressivism can play a useful role as well in adjudicating the close Commerce Clause cases. Some such cases will distinctively call for the embrace of symbolic or expressive considerations, and other such cases much less so, or not at all. Where it is appropriate, courts should attend to and invoke any distinctively relevant symbolic considerations in deciding the close Commerce Clause cases.

Given the limited predictability of the real consequences of much

173. The classic citation in the political science literature is MURRAY EDELMAN, *THE SYMBOLIC USES OF POLITICS* (2d ed. 1985). For a discussion of one element of our focus herein, see Sara Sun Beale, *Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool For Criminal Enforcement?*, 80 B.U. L. REV. 1227, 1247–48 (2000).

174. For discussion, see Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1504 (2000) (“At the most general level, expressive theories tell actors . . . to act in ways that express appropriate attitudes toward various substantive values.”) (discussing “the pervasively expressive character of much of the law”); Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 339 (2000) (“A strict focus on sanctions . . . obscures how law can otherwise influence behavior. Legal Theorists sometimes posit that law affects behavior ‘expressively’ by what it says rather than by what it does.”); Cass R. Sunstein, *On The Expressive Function of the Law*, 144 U. PA. L. REV. 2021, 2022 (1996) (“Many people support law because of the statements made by law, and disagreements about law are frequently debates over the expressive content of law.”). If the idea of an expressive function of the law is understood too broadly, however, the idea loses its distinctive interest value. See Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1364 (2000); Steven D. Smith, *Expressivist Jurisprudence and the Depletion of Meaning*, 60 MD. L. REV. 506, 511 (2001) (“[T]he claim that law expresses meaning is . . . so universally recognized that in itself it can hardly amount to any distinctive jurisprudential perspective . . .”).

175. See, e.g., the emotionally charged flag burning protest case of *Texas v. Johnson*, 491 U.S. 397, 410–11 (1989).

176. See Anderson & Pildes, *supra* note 174, at 1504.

177. See, e.g., Alex Geisinger & Ivan E. Bodensteiner, *An Expressive Jurisprudence of the Establishment Clause*, 112 PENN. ST. L. REV. 77 (2007).

178. See, e.g., Kitty Richards, *An Expressive Theory of Tax*, 27 CORNELL J.L. & PUB. POL’Y 301 (2017).

179. For the classic source, see generally Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397 (1965). For discussion, see generally Bernard E. Harcourt, *Joel Feinberg On Crime and Punishment: Exploring the Relationship Between the Moral Limits of the Criminal Law and the Expressive Function of Punishment*, 5 BUFF. CRIM. L. REV. 145 (2001); Susan A. Bandes, *All Bathwater, No Baby: Expressive Theories of Punishment and the Death Penalty*, 116 MICH. L. REV. 905 (2018).

Commerce Clause-based legislation, it is important to recognize that incorporating respect for symbolic value in adjudication need not always aspire to provable change in any underlying behavior. Nor need symbolically oriented adjudications amount merely to a trivial consolation prize for a superficially “winning” party. Sometimes there is real public value in “making a statement,” in getting an institution officially “on the record” in some context, or in fulfilling a public need to “send a message.”<sup>180</sup> Judicially sending a symbolic or expressive message thus need not be aimed, at least primarily, at producing any provable material change in the world.<sup>181</sup>

Some, but not all, of the close Commerce Clause cases will have some loose association with fundamental constitutional rights and values, or even with widely recognized basic human rights.<sup>182</sup> In those close Commerce Clause cases, the mere presence of fundamental constitutional or human rights concerns, even in the absence of their actual violation, should ordinarily tip balance in favor of at least symbolically or expressively acknowledging and endorsing the basic right in question.

Consider again in this context our exemplary hate crime case of *United States v. Hill*.<sup>183</sup> *Hill* involved a physical assault and battery, motivated by hostility on the basis of sexual orientation.<sup>184</sup> In this instance, the nature of the charge and the available range of penalties under Virginia state law could not begin to match those available under the Federal Hate Crimes Prevention Act.<sup>185</sup> Particularly under these circumstances, especially including victimization on the basis of sexual orientation,<sup>186</sup> along with the sheer public physical battery itself,<sup>187</sup> a national-level symbolic and expressive

180. Beale, *supra* note 173, at 1254.

181. Something akin to this point, and the underlying distinction among kinds of symbolic adjudications, is discussed in McAdams, *supra* note 174, at 339 n.2 (citing Lewis A. Kornhauser, *No Best Answer?*, 146 U. PA. L. REV. 1599, 1624–25 (1998)). We assume, of course, that the Commerce Clause case in question does not actually involve any actionable violation of any fundamental constitutional right. Any such case should be adjudicated on precisely those fundamental constitutional right grounds.

182. For background, see generally JAMES GRIFFIN, *ON HUMAN RIGHTS* (2008); JAMES W. NICKEL, *MAKING SENSE OF HUMAN RIGHTS* (1987); HENRY SHUE, *BASIC RIGHTS* (2d ed. 1996).

183. *United States v. Hill*, 927 F.3d 188 (4th Cir. 2019); *see also infra* Part I.

184. *See Hill*, 927 F.3d at 193. Consider also the notorious racially-based hate crime case of *United States v. Roof*, 225 F. Supp. 3d 438 (D.S.C. 2016) (applying the federal Church Arson Act).

185. *See Hill*, 927 F.3d at 194. But again, there could still be justification for a Commerce Clause-based federal prosecution, for national-level symbolic and expressive purposes, even if the federal and state level and penalties were similar.

186. For an authoritative account of the effects of governmental sexual orientation discrimination under an equal protection and substantive due process analysis, *see generally* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

187. For the classic exposition of the relationship of basic physical safety, bodily integrity in public spaces, and bodily security to even minimal well-being, *see* THOMAS HOBBES, *LEVIATHAN* 183–86 (C.B. MacPherson ed., 1968) (1651). For human rights references to physical security of the person, *see*

statement is generally appropriate. Combined with the crucial element of explicit discrimination on the basis of sexual orientation, the public physical battery in *Hill* and the fundamental status of physical safety suggest the value of an authoritative judicial denunciation, and a clear symbolic statement through a prosecution at the national level.

But not every close Commerce Clause case will evoke any sense of lurking fundamental constitutional or human rights, or the basic values underlying such rights, whether any such rights are actually violated in the given case or not. Some close Commerce Clause cases are instead merely near the limits of the congressional power to, for example, remove barriers to the free and uninhibited flow of manufactured goods. Even the leading case of *Wickard v. Filburn* involved only Filburn's alleged violation of his own agreement to limit his wheat production in exchange for price subsidies,<sup>188</sup> with no fundamental constitutional or human rights, or their underlying basic values, anywhere on the horizon. No such rights are typically relevant even to broad, important, health-related statutes and regulations, as in, for example, the area of a legally specified uniformity in food nutrition labeling.<sup>189</sup> Many Commerce Clause-based regulations are mostly about ordinary commerce, and may even have, overall, neither significantly favorable nor significantly unfavorable effects even on commerce.<sup>190</sup>

Normally, close cases that do not implicate the values underlying any fundamental constitutional or human right should take seriously the widely

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GRIFFIN, *supra* note 182, at 193 ("We have a right to life and to some form of security of person."); NICKEL, *supra* note 182, at 86; SHUE, *supra* note 182, at 20 ("[P]eople have a basic right to physical security—a right that is basic not to be subjected to murder, torture, mayhem, rape, or assault."); see also Jeremy Waldron, *Security as a Basic Right (After 9/11)*, in GLOBAL BASIC RIGHTS 207, 211 (Charles R. Beitz & Robert E. Goodin eds., 2009).

188. See *Wickard v. Filburn*, 317 U.S. 111 (1942).

189. See Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, 104 Stat. 2535 (codified as amended at 21 U.S.C. § 343 (2018)).

190. For a broad critique, see generally OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE (2014); R. George Wright, *The Compelled Commercial Speech Cases: Why Not Just Flip a Coin?*, 71 MERCER L. REV. (forthcoming 2020). For a number of entertaining examples from other areas of federal law, most with a Commerce Clause basis, see Jason Pye, *19 Ridiculous Federal Criminal Laws and Regulations*, FREEDOM WORKS (January 14, 2016), <https://www.freedomworks.org/content/19-ridiculous-federal-criminal-laws-and-regulations> [<https://perma.cc/S67P-TGP2>]. More broadly, see generally MIKE CHASE, HOW TO BECOME A FEDERAL CRIMINAL: AN ILLUSTRATED HANDBOOK FOR THE ASPIRING OFFENDER (2019) (drawing from <https://twitter.com/crimeaday> [<https://perma.cc/PJ8P-UK6S>]). Consider also whether the entirely intrastate Delhi Sands Flower-Loving Fly is somehow related to the values underlying fundamental constitutional or human rights and could not be adequately protected by the State of California. See Nagle, *supra* note 162 (discussing the diverging opinions in *Nat'l Assn. of Homebuilders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997)).

recognized values and advantages of a meaningfully federalist system. In those close cases, the values of federalism, dispersion and decentralization of authority, welfare efficiency, pluralism, community, local democracy, and state-level experimentation should normally prevail.<sup>191</sup> Where no fundamental constitutional or human right or their underlying values are implicated in a close Commerce Clause case, the limiting values of federalism should thus ordinarily control.<sup>192</sup>

### CONCLUSION

In the various close Commerce Clause cases, the courts must confront, or more typically ignore, multiple problems of vagueness; of what kinds and degrees of effects on interstate commerce are to be constitutionally required in a given case; of how to meaningfully distinguish between “active” and “passive” involvement with interstate commerce; and of when and how to aggregate minimal effects on interstate commerce into a somehow substantial overall effect. Until the courts can arrive at some appropriate clarification of these constitutional uncertainties, courts are better advised to instead direct their focus elsewhere when addressing the many close Commerce power cases.

Specifically, courts in such cases should consider whether the case circumstances detectably evoke a sense of the values underlying any fundamental constitutional or human right. Violent bias-motivated attacks present the clearest such cases, and those cases should ordinarily be held to fall within the scope of the Commerce Clause power. Such cases afford the courts an opportunity to at least symbolically or expressively validate, if not to materially advance, national-level policy values of the highest order. On the other hand, if a close Commerce Clause case evidently bears no

191. See GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 175–81 (8th ed. 2018); see also A.E. Dick Howard, *The Values of Federalism*, 1 NEW EUR. L. REV. 143 (1992); Robert P. Inman, *Federalism's Values and the Value of Federalism* (Nat'l Bureau of Econ. Research, Working Paper No. 13735, 2008).

192. While it is certainly possible that we could all be mistaken about fundamental constitutional or human rights, epistemic humility is a virtue not only for federal decisionmakers, but for state-level decisionmakers as well. For useful discussion, see generally Guido Calabresi & Eric S. Fish, *Federalism and Moral Disagreement*, 101 MINN. L. REV. 1 (2016). And while elements of our own proposal herein are certainly vague, it is important to recognize that the overall consequences of vagueness may, depending upon context, be harmful; modest; or even beneficial. The vagueness of terms such as “fundamental constitutional rights” and “recognized constitutional rights” can, if desired, be reduced by any authoritative listing of such rights. Persons can certainly continue to debate which rights should be on the authoritative list, but the adopted list will not count as itself damagingly vague. Of course, referring to such rights as “in the neighborhood,” or “lurking,” or being loosely suggested but not violated in a given case invokes deliberately vague ideas. However, vagueness in this context is not only inevitable, but deeply valuable; it distinctively sensitizes courts to the possibility of, in a proper case, symbolically advancing the most important moral and legal values of which we know: those of recognized basic rights.



detectable relationship to any fundamental constitutional or human right, or to the values crucially underlying such rights, the courts should normally accommodate instead the values and interests served by federalism, and hold the case to fall outside the scope of the Commerce Clause power.